3 Black Book

Barriers on the Internal Market

Ministry of Economic Development and Technology
Republic of Poland

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Republic of Poland

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Ladies and Gentlemen,

The release of another - the third - "Black Book" coincided with the Polish Presidency of the Council of the European Union. Its topics are in line with our priorities. Polish Presidency among other things, will support activities aimed at deepening the EU's single market and removing barriers to cross-border activity, with particular emphasis on the services sector. The new European Commission will work meanwhile on the Single Market Strategy. There are many challenges in this area, but also opportunities that we should, as a European community, take advantage of, thus taking care of the future and economic security of our region.

All recent EU documents - the policy guidelines to be followed by the President of the European Commission, the Conclusions of the Competitiveness Council, and the reports by Enrico Letta, Mario Draghi, or Sauli Niinistö - point to the need for changes in EU economic policy. Our primary goal should be to ensure the long-term competitiveness and resilience of the single market vis-à-vis third countries, while maintaining a level playing field in the EU internal market.

This report is the third one over the past five years that has drawn on the specific experiences of entrepreneurs. It verifies whether the previously indicated barriers have been eliminated or at least reduced, or whether new ones have emerged. The third "Black Book", will, during the Polish Presidency, support the discussion we initiated a few years earlier on diagnosed problems and proposed solutions to constraints in the single market, particularly in the area of freedom to provide services.

Dialogue, in my opinion, is one of the most valuable tools for learning not only about experiences, opinions and problems, but above all for developing new directions for action. So I count on your voice, active participation in the discussion of Polish entrepreneurs, remarks, comments and information about barriers. I would like us to jointly take advantage of this unique moment of focusing the EU's political attention on the single market and work out proposals for improving its functioning.

Yours faithfully,

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INTRODUCTION

Foreword:

The first two editions of the *Black Book of Barriers on the Internal Market* were published in 2020 and 2021.[1] They included descriptions of problems that made it difficult for Polish entrepreneurs to operate across borders in the EU. The case descriptions were anonymised, but we raised them on the EU forum, in discussions with the European Commission, and in bilateral contacts with other Member States.

Several years have passed, and the awareness of barriers is different than in 2020 and 2021. Therefore, we decided to check whether the single market mechanisms have worked and whether the difficulties signalled at that time have been resolved, facilitating cross-border business operations. The first part of this edition is dedicated to this issue, where we update information on previous submissions. In the second part, we describe new problems that we have received information about from market participants in 2024.

Trade in services from Poland to the EU:

For Polish entrepreneurs, the export of services to the EU remains a very important part of foreign trade and has been maintained at a similar level of about 20–23% for years, with the import of services at a significantly lower level, around 13–15%[2]. According to the Polish Economic Institute, Poland specializes in transport services (36% of services delivered to the EU in 2020). The importance of professional services is also growing; this sector accounts for 13% of all Polish exports of services to the EU. Equally important are accounting, auditing and tax services, business consulting and PR services, or marketing and opinion polls. IT and retail services, as well as other business services, account for 10%[3].

The summarised data presented above clearly confirm how important the ability to provide cross-border services in the EU according to Article 56 TFEU is for Polish entrepreneurs, and how significant the losses are if the exercise of this freedom is disrupted.

However, let us emphasise that the economic losses caused by barriers to cross-border flow do not only affect Polish entrepreneurs or the Polish economy, but also entrepreneurs and economies from other Member States and, ultimately, the EU economy as a whole.

Tangible losses caused by barriers:

The fact that barriers to cross-border activities bring about actual losses and hinder the growth of the entire EU's competitiveness in the global market is no longer in doubt. This state of affairs is clearly noted in EU documents relating to the state of integration of the single market, especially in the area of the single market for services. According to *Annual Single Market Report 2023*, in the long term, the potential benefits of removing obstacles to cross-border service provision in the EU, depending on the degree of reduction in the gap with integration leaders,

1 Both editions are available on the Ministry of Economic Development and Technology website at: https://www.gov.pl/web/rozwoj-technologia/czarna-ksiega-barier-na-ktore-polskie-firmy-napotykaja-w-panstwach-ue

2 NBP data, see for example: https://nbp.pl/wp-content/uploads/2024/12/Miedzynarodowy-handel-uslugami-Polski-w-2023-r.pdf

3 https://pie.net.pl/wp-content/uploads/2023/07/PIE-Raport_Jednolity_rynek_2023-EN.pdf

could amount to an additional €279 to €457 billion in the EU GDP annually[4]. In the absence of actions to eliminate barriers, the aforementioned amounts should be recorded as a loss.

This year is rich in important reports for the future of the EU. Unfortunately, in our opinion, services were not sufficiently reflected in the Single Market Report by E. Letta and the Competitiveness Report by M. Draghi. E. Letta viewed services narrowly, focusing on areas such as retail and construction, without proposing ambitious ideas for deepening integration in the sector. M. Draghi did not directly address the European Commission's estimates regarding the untapped economic potential of the services market. Nevertheless, we believe that his report clearly indicates that an integrated single market is the foundation of European competitiveness.

On the other hand, the report by S. Niinistö on European security contains significant observations. It is worth noting that according to Niinistö's report, the free movement of services within the EU is an important element in building European security, particularly in terms of the ability to provide services in critical areas such as energy supply, transport, water, and food.

The case law of the Court of Justice of the EU:

In the introduction to the second edition of the Black Book of barriers, we pointed out that the case law of the Court of Justice is, by its very nature, fragmented, as it depends on the national court actually using the preliminary ruling procedure. In the area of freedom to provide services, such questions have been rather rare in recent years, and their outcome – often referring to the proportionality assessment made by the national court – cannot be satisfactory for cross-border entrepreneurs. Nevertheless, knowledge of the CJEU's case law and the ability to invoke it in defence of their Treaty-guaranteed rights remains important for participants in the single market.

Sanctions related to the posting of workers

In the recent, not very extensive, case law of the Court of Justice of the EU concerning the freedom to provide services, including the posting of workers, it can be observed that the Court prioritises the social aspect, understood as the protection of the rights of posted workers, by allowing various actions by national authorities justified by the general need to ensure effective control of companies posting employees. For example, in the judgment of 2022 in case C-219/20, 'Bezirkshauptmannschaft Hartberg-Fürstenfeld and Österreichische Gesundheitskasse,'[5] the Court allowed an extended limitation period of up to 5 years concerning violations related to the underpayment of posted workers, not agreeing with the opinions presented that it poses a risk of the employer being unable to effectively present evidence and their position.

On the other hand, regarding the preliminary question on the possibility of directly applying Article 20 of *Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System* concerning the requirement of proportionality of penalties for violations of posting rules, the Court responded affirmatively in the judgment of 2022 in case C-205/20, 'Bezirkshauptmannschaft Hartberg-Fürstenfeld,'[6]. Moreover, from the principle of the primacy of EU law, the Court derived the obligation for administrative authorities to refrain from applying national provisions that are even partially inconsistent with the aforementioned requirement of proportionality. This obligation is limited solely to the extent necessary to enable the imposition of proportional sanctions.

However, while this judgment provides market participants with the opportunity to oppose barriers resulting from excessive sanctions, its application may unfortunately encounter prac-

4 Annual Single Market Report 2023, p. 9; https://single-market-economy.ec.europa.eu/system/files/2023-01/ASMR%202023.pdf

5 Judgment of the Court of 10 February 2022 in case C-219/20 'Bezirkshauptmannschaft Hartberg-Fürstenfeld and Österreichische Gesundheitskasse,' https://curia.europa.eu/juris/document/document.jsf?text=&docid=253722&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1739879

6 Judgment of the Court of 08.03.2022 in case C-205/20 'Bezirkshauptmannschaft Hartberg-Fürstenfeld,' https://curia.europa.eu/juris/document/document.jsf?text=&docid=255245&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1741132

tical problems: starting with the awareness of entrepreneurs and officials in the Member State, and ending with difficulties in assessing to what extent a given requirement is disproportionate and what scope of exemption from the regulation is appropriate.

Distinction between permanent cross-border activity and temporary cross-border activity

In a previous edition of the Black Book, we wrote about the issue of practically distinguishing between temporary and cross-border service activities and activities of a permanent and continuous nature. In this regard, the available case law of the Court in 2021 was enriched by an important judgment in case C-502/20, 'Institut des Experts en Automobiles'[7]. The Court opposed the application of national regulations that would prohibit a business established in another Member State from temporarily and occasionally practicing a profession in the host Member State's territory due to the fact that the business previously had an establishment in that Member State. Moreover, the Court clarified that the repetitive, albeit irregular, nature of these services and even the possession of some infrastructure in the host state do not exclude the temporary and occasional nature of the activities conducted by the service provider.

Posting of workers who are third-country nationals

A new judgment, which addresses the difficulties in posting workers who are third-country nationals, is the judgment of 20 June 2024 in case C-540/22, 'Staatssecretaris van Justitie en Veiligheid'[8]. However, this is not a judgment that definitively resolves the issue of barriers introduced through residency regulations. In this judgment, the Court stated that workers who are third-country nationals, posted to one Member State by a service provider based in another Member State, do not automatically have a 'derivative right of residence' either in the Member State where they are employed or in the Member State to which they are posted. On the other hand, the judgment suggests that an excessively short residence permit period, excessive formalities related to its extension, and application fees exceeding the administrative costs of processing the application constitute a restriction on the freedom to provide services that is incompatible with the principle of proportionality. Importantly, the Court in this judgment considers the requirement for obtaining a residence permit for posted third-country nationals to be justified only in cases where the stay exceeds a three-month period (paragraph 102 of the judgment). Nevertheless, regarding the posting of workers who are third-country nationals, there remain many uncertainties and a lack of established case law from the Court, which may only develop with further preliminary rulings in this area.

EU actions against barriers:

Single Market Enforcement Task-Force (SMET)

In the introduction to the second edition of the Black Book, we mentioned the establishment of the Single Market Enforcement Task-Force (SMET[9]). At that time, it was not yet possible to assess the work of this formation, as during the first year it was mainly dealing with pandemic-related restrictions. Currently, SMET, which brings together representatives of Member States and the European Commission, has been operating for four years and is an important tool in combating barriers in the single market.

The group's work involves seeking practical solutions to identified problems, ideally without the need to change EU law. The possibility of adopting specific facilitations is being discussed, particularly in the development of so-called best practices, in the context of selected thematic projects, such as the recognition of professional qualifications as part of so-called prior checks, streamlining procedures for issuing permits for renewable energy sources, or the scope of formalities related to the posting of workers in the

7 Judgment of the Court of 02.09.2021 in case C-502/20 'Institut des Experts en Automobiles,' https://curia.europa.eu/juris/document/document.jsf?text=&docid=245544&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1740442

8 The Court's judgment of 20 June 2024, in case C-540/22, 'Staatssecretaris van Justitie en Veiligheid,' https://curia.europa.eu/juris/document/document.jsf?text=&docid=287304&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1740781

9 https://ec.europa.eu/internal_market/smet/index_en.htm

provision of services[10].

The *de facto* informal, cooperation-based approach of SMET is both its strength – allowing for the introduction of difficult topics into discussion – and its weakness, as without the involvement of relevant ministries (pertinent to the area of a given project) and the political will of states, SMET's ability to act is limited, especially in areas deemed to be too sensitive.

In our opinion, it is worthwhile to involve the business community more in the work of SMET, giving businesses the opportunity to support these efforts in a structured way and thus leveraging the practical experiences of cross-border entrepreneurs[11]. This is a proposal that has been repeatedly put forward by Polish representatives in SMET, which we hope to implement during the Polish presidency.

The project of a common electronic form for posting

Considering the particularly heavy burden of barriers to posting workers in the context of the provision of services on one hand and the high political sensitivity of the topic on the other hand, the European Commission announced in the 2021 update of the EU Industrial Strategy the implementation of a common electronic form for posting[12].

As part of the expert group, a common list of information requirements has been established by the end of 2023, which applied to: the service provider, the posted worker, the posting, the designated contact person, and the service recipient. However, many Member States, especially in Western and Northern Europe, have declared their intention not to apply it, due to the inability to add their own requirements, which these states consider necessary for effective controls. On the other hand, 9 Member States, including Poland, expressed their willingness to continue working and finalise the project through a political declaration signed in May 2024 (apart from PL: DE, CZ, LT, IE, EL, SI, HU, PT).

On 13 November 2024, the college of Commissioners adopted a proposal for a *Regulation on a public interface connected to the Internal Market Information System for the declaration of posting of workers and amending Regulation (EU) No 1024/2012 on the Internal Market Information System*.

The proposal provides for the creation of a common multilingual public interface connected to the IMI system for declarations concerning the posting of workers, the use of which will be voluntary. The existing EU regulations on the posting of workers will remain unchanged. The template for the standard information requirements form will be established in an implementing act by the EC, taking into account the findings of the expert group.

The objectives pursued by the proposal include: reducing administrative barriers to cross-bor-

10 The full list of projects is available here: https://ec.europa.eu/internal_market/smet/projects/index_en.htm

11 On 13 September 2022, SMET members representing Poland and the Netherlands organised a special workshop on barriers in the single market, attended by entrepreneurs, representatives of consumer and business organisations, Member States, and the European Commission. Furthermore, representatives of entrepreneurs were invited to some SMET meetings and the Sherpa working group within SMET, where they could explain in detail the problems they encountered.

12 Communication of the Commission: 'Updating the 2020 New Industrial Strategy – Building a stronger Single Market for Europe's recovery,' COM(2021) 350 final https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0350, p. 9

der service provision, facilitating effective compliance control with EU regulations aimed at ensuring the protection of posted workers, and supporting administrative cooperation among the competent authorities of the Member States.

Work on the project in the EU Council will take place during the Polish presidency. It is clear that the scale of its positive effect for EU entrepreneurs will depend on the number of countries that decide to use the common interface.

POSTING/SERVICES

Part I – Previous Submissions

Fines for lack of A1 (Black Book 1, point 1)

The issue was related to the practice of supervisory institutions in country X, which require entrepreneurs to immediately present the A1 certificate during inspections or provide it electronically. However, national regulations do not require having these documents at the time of starting the delegation. Many entrepreneurs do not have it at that moment, and as a result, they are penalised depending on whether such a requirement is adopted by the practice of the respective supervisory institution.

According to the information we have obtained, the problem has not yet found a systemic solution, and moreover, it currently also occurs in another Member State Y, where this issue is particularly troublesome in construction postings, especially concerning contracts implemented by the largest construction companies. For this reason, entrepreneurs aware of the problem attach great importance to ensuring that, in the case of postings to the mentioned countries, they submit an A1 application in advance. A warning about the potential negative consequences of not having an A1 certificate at the start of a posting is also to find on the website of the Polish Social Insurance Institution.

Definition of posted worker (Black Book 1, point 6)

The issue was related to the statutory definition in country X, which introduced the requirement that a posted worker must be habitually employed with the posting employer prior to being posted. This condition prevents the employment of a worker for the purpose of posting to country X if they were previously unemployed or worked for another employer. In particular, it becomes impossible to post workers for temporary work. As we indicated in the first edition of the Black Book, this requirement is not in line with the case law of the CJEU and the *Practical guide on the posting* published by the EC in 2019. It should be emphasized that it prevents the posting in one of the three forms expressly permitted in the provisions of Directive 96/71/EC.

The statutory definition in country X has not changed and remains inconsistent with EU regulations. Additionally, a similar requirement is applied in practice in another country Y, where regulatory bodies challenge the correctness of posting temporary workers based on the assertion that proper posting of such workers requires their employment by a temporary work agency for a certain period before being posted to a user-employer abroad.

Obligation to pay contributions to the leave pay fund (Black Book 1, point 7)

Previously, we reported that in country X, Polish enterprises are not entitled to exemption from the obligation to belong to the paid leave fund of that country, even though they provide posted workers with the right to paid leave under conditions equivalent to those guaranteed by the law of country X during the posting period. As a result, the Polish employers are doubly burdened, as they are required to pay contributions for paid leave and downtime for employees in country X, while simultaneously paying employees in Poland the equivalent for paid leave under the Polish employment contract.

According to the information we have obtained, some leave pay funds in country X are currently making decisions to exempt Polish entrepreneurs from the obligation to belong. The main issue remains the lack of clear criteria for exemption from this obligation, and thus the uncertainty for entrepreneurs regarding the scope of obligations that will be imposed on them in country X.

The website of the relevant ministry of country X also contains information about the obligation to belong to the paid leave fund and the so-called 'bad weather fund'; concerning employees in the construction, public works, and entertainment sectors. Exemption from this obligation occurs for entrepreneurs from countries with which country X has signed a special agreement, as well as in situations where an entrepreneur can demonstrate that their employees enjoy equivalent rights in their country of origin. The latter, as it turns out, can be problematic in practice.

Restrictions on the posting of third-country nationals (Black Book 2, point 5)

The freedom to provide services also includes posting workers from third countries who are legally employed by the sending employer. In the case law concerning this issue, the Court

emphasized, among other things, that the host country cannot require a work permit for such a worker, nor can it impose other additional requirements related to the type of employment contract or its duration.

In the second edition of the Black Book, we described a burdensome barrier to the use of Article 56 TFEU introduced by country X through residence regulations – they prevent such a worker from legally residing in country X if the worker does not have long-term resident status in Poland. Obtaining such a status requires a prior 5-year stay in Poland. Under the regulations of country X, a third-country national holding such status may work for up to 90 days within a twelve-month period without additional residence formalities, including obtaining the so-called Vander Elst visa.

According to the information we have obtained, the issue has not been resolved so far. Posted workers who are third-country nationals and do not hold long-term resident status in Poland are required to obtain the so-called Vander Elst visa before being posted to country X, despite their situation in Poland as the sending country being regulated – they reside and work here legally. Moreover, country X in practice applies automatic expulsion of such workers in the event of entry without a Vander Elst visa, even for short-term stays.

According to information from Polish entrepreneurs posting foreigners to country X, the procedure for obtaining a Vander Elst visa remains time-consuming and difficult, considering the limited availability of appointment slots, the need for multiple visits to the consulate in the capital city, and significant fees.

Taking the above into account, we still believe that such regulations violate Article 56 TFEU and the CJEU's case law interpreting it, as well as the principle of the autonomy of EU law concepts, effectively depriving EU entrepreneurs posting their employees – third-country nationals – to provide services, of the freedom to provide services.

Problems with temporary cross-border service activities (Black Book 2, point 7)

This case pertains to the extremely important issue of practically distinguishing between the permanent and continuous activities of entrepreneurs from other Member States and temporary cross-border activities. The authorities of country X surprisingly often claim that Polish entrepreneurs posting workers as part of cross-border service provision are, in fact, conducting permanent and continuous activities in country X, and therefore this activity should be registered there. These authorities also discourage foreign entrepreneurs in a systematic and organised manner from providing services by notifying the prosecutor's office of suspected illegal activities, by excessively frequent inspections, and threatening local contractors with joint liability. As a result, the only practical solution becomes registering the business in country X or giving up cross-border service provision.

According to the information we have obtained, the problem has not been resolved despite efforts in bilateral contacts with the administration of country X. Country X has refused to issue guidelines distinguishing permanent and continuous activities from temporary cross-border activities, emphasising the need to assess each case on a case-by-case basis. The European Commission has also not taken action on this matter, pointing to the competencies of the authorities of country X and seeing the only solution as referring cases to the courts of country X (which is costly and time-consuming for businesses). The necessity for cross-border busi-

nesses to assert their Treaty-guaranteed rights in this manner should indeed be assessed as a failure of the single market.

The scale of reports about the problem has recently decreased – this is likely due to the fact that businesses for whom operations in country X are important have largely decided to register their activities there, i.e., by establishing separate companies.

Issuing construction IDs (Black Book 1, point 10)

Due to technical issues, Polish identity cards issued before 1 March 2015 were not recognised as valid identification for obtaining a special identification card for construction sector workers in country X[13]. An additional problem was the requirement to replace the cards in line with a new design, even though the old ones had not expired, which was associated with additional costs.

It seems that the aforementioned technical issues related to the replacement or issuance of cards are no longer occurring (we have not received any information in this regard). Nevertheless, numerous issues remain unresolved regarding the difficulties in posting workers for cross-border service provision, which is particularly common in the construction industry. Some of the problems could be alleviated by adopting a common electronic form for posting workers, which is currently being developed. To achieve a noticeable positive effect for foreign entrepreneurs, however, it would be necessary for a significant number of Member States to use the common e-form.

Institutions' activities to coordinate social security systems (Black Book 2, point 8)

Entrepreneurs encountered difficulties in cross-border activities within the EU single market due to the specific application of Regulations No. 883/2004 and 987/2009 by institutions coordinating social security systems. The most common problems include the short deadline for obtaining the A1 certificate and the related fines, the inclusion of posted workers in national social security systems despite having the A1 certificate, and the lack of easily accessible information for entrepreneurs about employee reporting procedures.

Information available online indicates the continued existence of the problem, providing a general outline of its persistent presence in the single market.

Accommodation of temporary workers (Black Book 2, point 9)

In some municipalities of country X, regulations derived from local spatial development plans have been introduced, which limit the accommodation of temporary workers. They require registration in the municipality, which involves the necessity of presenting a rental agreement and the landlord's consent. In cases where the development plans do not allow for the accommodation of temporary workers, registration becomes impossible, which prevents obtaining identification number needed for legal work and effectively blocks conducting business activities, even though it is permitted by EU law.

Entrepreneurs point out that this barrier still exists, and additional legal changes are planned that will introduce further restrictions, making access to the market for employee secondment services even more difficult.

Information available online indicates that the problems with accommodating migrant workers are numerous and also include a lack of available housing. Employment contracts are often directly linked to rental agreements, which becomes an additional complication. The trade union for migrant workers operating in country X opposes such practices and fights to improve their conditions. The media also report on the increasing number of housing complexes for migrant workers, which is met with resistance from local residents. The new regulations, set to take effect in 2026, prohibiting the shared accommodation of several workers in one room, will necessitate the construction of new housing, which also sparks political controversy.

Excessively high penalties (Black Book 2, point 10)

In many European Union Member States, there has been a tendency to impose excessively harsh

13 The primary aim of the system was to enhance work safety on construction sites and reduce illegal employment in the construction industry (the card is mandatory for everyone present on the construction site).

sanctions for violations related to the posting of workers. Although these matters remain within the competence of individual Member States, EU regulations require that penalties be effective, proportionate, and dissuasive. The Court of Justice of the European Union (CJEU) in case C-64/18 (Maksimovic) ruled that the freedom to provide services does not allow for the imposition of rigid limits on fines. In the discussed case, it was indicated that compliance with the regulations could have been achieved using less restrictive measures, without the accumulation of financial penalties and imprisonment.

Moreover, according to entrepreneurs, issues related to the imposition of excessively high penalties for delegation infringements remain relevant, although the CJEU's case law (e.g., in cases C-64/18 and C-205/20) has contributed to limiting the use of cumulative penalties in some countries.

Hindered access to information (Black Book 1, point 11)

The website in country X, through which posted workers are registered, was not sufficiently transparent. National regulations, collective agreement provisions, and procedures regarding posting were available only in the language of country X. Despite the absence of an obligation to translate these into English (as per the EC's position), the lack of translation had to be considered a significant obstacle for companies posting workers.

Since the issue was reported, translations have been posted on the website. This allows us to conclude that the problem has been largely eliminated.

Non-recognition of work permits issued to third-country employees (Black Book 1, point 4)

A Polish entrepreneur encountered difficulties in country X with posting Ukrainian workers based on Directive 96/71/EC. Ukrainian workers had work permits in Poland, but not in country X, which hindered the provision of construction services. The workers had an A1 certificate, but it was based on work in several countries, not posting, which raised concerns. The problem arose from differences in interpretation between posting and working in different countries according to Regulation No. 883/2004. Directive 2011/98/EU simplifies procedures for third-country nationals but does not apply to posted workers. The problem still lies in the practical application of the regulations in country X.

Due to the aforementioned difficulties and the inability to resolve the issue, the Polish entrepreneur decided to cease providing services in country X.

Obligation to have a representative (Black Book 1, point 12)

In country X, there is a requirement for foreign transport companies to have a permanent representative, regardless of the frequency of service provision. This is particularly problematic and costly for companies that only carry out occasional assignments. Although this requirement is supported by Article 9 of Directive 2014/67/EU, which allows Member States to introduce such obligations, in practice it may lead to excessive difficulties for companies with limited operations in the given country.

The requirement to appoint a permanent representative in country X stems from the labour code regulations of that state. For example, the regulations of country X require companies posting workers to appoint a permanent representative within its territory, whose task is to cooperate with state authorities and provide documents throughout the posting period. The basis for this obligation is Article 9 of Directive 2014/67/EU, which allows for the introduction of administrative requirements, including the designation of a contact person. However, according to the principle of proportionality, such requirements must be necessary. For many companies, this obligation generates additional costs and constitutes a barrier to the functioning of the single market.

Based on the available information, the problem in country X has not changed so far, thus it still affects EU carriers. Nevertheless, it should be noted that the issue of the physical presence of a contact person in the host country was addressed by one of the good practices discussed within the SMET project related to the cross-border provision of services – many Member States have declared that they already accept the appointment of a contact person who is not present on their territory but is easily reachable through electronic means of communication. A few countries have also committed to further considering the possi-

bility of applying this practice themselves.

Part II - New Submissions

Compensation rules under collective agreements

After the entry into force of Directive (EU) 2018/957 amending Directive 96/71/EC, determining the appropriate compensation for employees became a problematic issue when posting workers to country X. The ambiguity and complexity of national regulations, as well as the lack of clear and straightforward guidelines for foreign employers, lead to a situation where inspections in country X excessively impose sanctions on businesses posting workers there.

Before the entry into force of Directive 2018/957, a foreign employer compensated employees according to the statutory minimum wage or the minimum contractual rate. Currently, after the introduction of the principle of equal pay by Directive 2018/957, a foreign employer is required to: determine the appropriate collective agreement for the type of work performed by the posted worker in country X, assign the appropriate index, and establish the minimum

wage rate for that index.

Determining the appropriate collective agreement and the so-called position index is so complicated that it discourages entrepreneurs from posting workers for cross-border services, prompting them instead to register their business in country X. This makes it all the more necessary to create a reliable tool at the EU level to facilitate the calculation of wages for posted workers.

Problems with utilising the required contribution to the leave pay fund

In country X, the required contribution to the leave pay fund entitles employers posting workers, leased to companies in the host country, to train their personnel in order to enhance their qualifications. A similar type of contribution to the Labour Fund is paid by entrepreneurs in Poland, where they also train their employees.

The barrier is that the management of the aforementioned institution in country X requires employers posting workers to bring their employees to country X for training, which exposes them to additional high costs (e.g., transport, accommodation). For employers posting workers, it would be less burdensome if the training and related exams could take place in the country of their headquarters (e.g., in Poland).

Residence registration fees

Member State X, in the case of extending the right of residence in this state for third-country nationals posted by a service provider from another Member State and already working in Member State X for that service provider, charges fees that are equal to the fees due for obtaining a regular residence permit in connection with employment by a third-country national, but are simultaneously five times higher than the fees due for issuing a certificate of legal residence to a Union citizen.

Considering that the posting of third-country nationals is an activity within the scope of the freedom to provide services guaranteed by Article 56 TFEU and explicitly permitted in the case law of the Court, it seems doubtful whether such costs comply with the principle of proportionality, especially since the posted individuals already have their employment and residence status regulated in the sending Member State.

National guidelines on the concept of service

Member State X, in the guidelines posted on the official national website, excludes from the concept of 'service' and thus from the scope of Article 56 TFEU, the situation where a posted worker from a third country performs dependent work for a local entrepreneur or company, similar to that of its own employees and in a similar position.

It should be noted that this does not concern direct employment in the enterprise of a local entrepreneur, as such an excluding condition is directly mentioned in another part of the guidelines. It is indicated there that a third-country national posted to this Member State X must be employed by the posting employer for the entire duration of the posting and cannot be in an employment relationship with the local entrepreneur to whom they have been posted.

The guidelines also indicate that if all the above conditions are not met, it likely constitutes an illegal circumvention of the law, where fictitious posting is used to allow a third-country national to avoid the requirement of obtaining a work permit in State X.

There is a lack of explanations on how to understand the concept of 'dependent work' for a local entrepreneur in a 'similar position' as the employees of that entrepreneur. Some local entrepreneurs, in need of workforce, in the absence of such a definition, require from the companies posting workers a statement that the posted workers (regardless of whether they are third-country nationals) do not perform work 'in a similar position.' Due to legal uncertainty, additional formalities, and fears of being accused of illegal activities, there is a significant hindrance for cross-border entrepreneurs.

TRANSPORT

Parking of heavy commercial vehicles (Black Book 2, point 3)

In 2018, country X introduced a rule limiting the maximum parking time to 25 hours in public rest areas along the motorway network. The regulation was justified by the fight against social dumping, allegedly practiced by transport companies employing drivers from Central and Eastern Europe, who were said to be 'camping' in parking areas to reduce costs. The European Commission challenged these regulations in the CJEU, arguing that they restrict the freedom to provide transport services, impacting foreign carriers more than domestic ones. Nevertheless, in its judgment of 21 December 2023, the CJEU dismissed the complaint, finding that the evidence presented by the Commission did not demonstrate that the available private parking areas were insufficient.

As a result, carriers from outside country X still have to contend with the difficulties arising from this regulation, which, although recognised as potentially constituting a barrier on the internal market, has not been amended.

Problems of carriers (Black Book 2, point 1)

Polish carriers encountered difficulties in country X, where inspections intensified and there was a strict approach to minor infractions, such as the absence of stamps on documents. The authorities of this country introduced a requirement for drivers of light delivery vehicles to sleep outside the cabin, forcing them to use hotels (this applied to the period before such a requirement was enforced under EU law). The lack of proof of accommodation resulted in high fines, which had to be paid immediately under the threat of immobilising the vehicle. These regulations were seen as too stringent, especially in the context of insufficient accommodation and parking infrastructure in country X.

In August 2020, as part of the Mobility Package, significant changes were introduced to improve the working conditions of drivers. According to the new regulations, drivers are required to return to their place of residence or company headquarters at least once every four weeks. Additionally, 45-hour regular weekly rests cannot be taken in the vehicle cabin and should be spent in a hotel or other suitable accommodation.

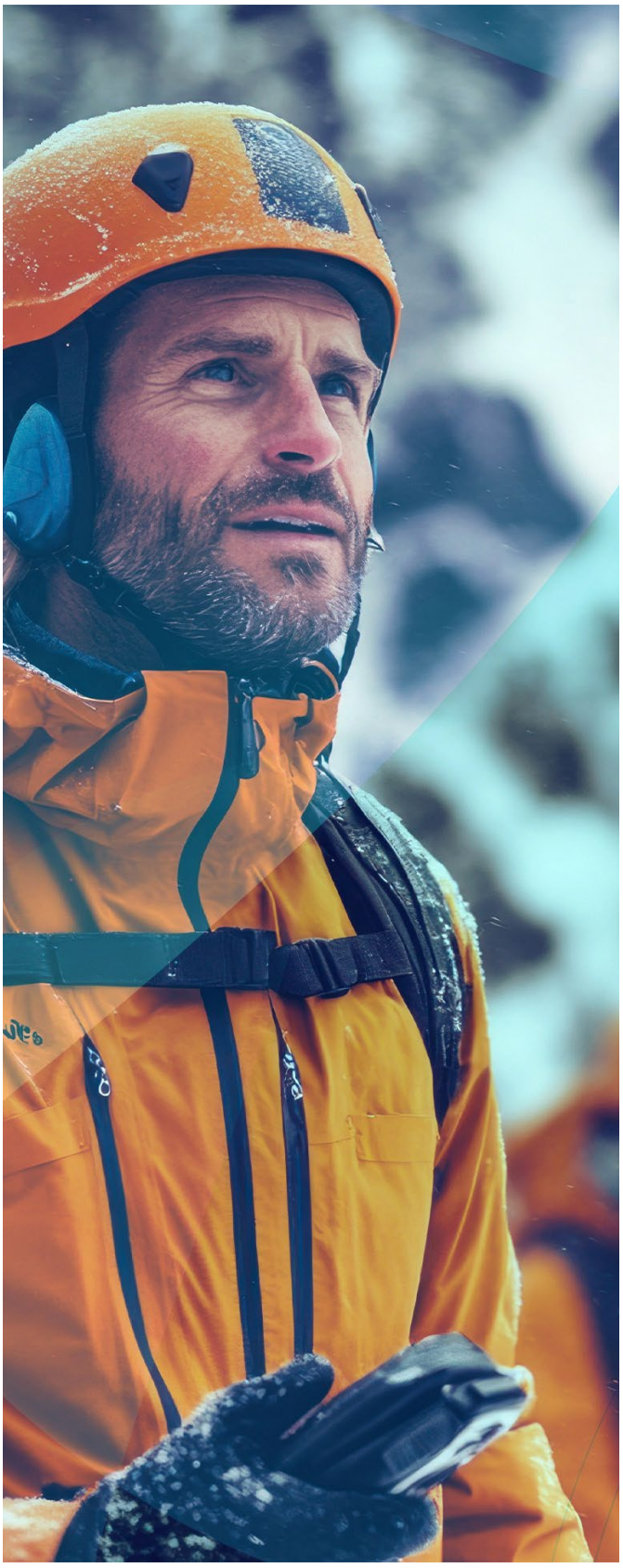
According to the information obtained, the situation of Polish transport companies is no longer a media or political topic in country X, but drivers still face difficulties. The road infrastructure in this country is considered one of the more problematic in Europe, and additionally, vehicles with Polish license plates are often subjected to intrusive inspections, such as prolonged checks, giving the impression of deliberate violation hunting.

Special marking of vehicles (Black Book 2, point 2)

Since January 2021, country X has introduced a requirement for all trucks over 3.5 tons and coaches to be marked with special stickers indicating blind spots. This requirement also applies to vehicles registered in other EU countries. The regulations specify in detail the designs, dimensions, and placement of the stickers. The main goal of introducing these regulations is to improve road safety; however, they raise concerns about practicality and compliance with EU law and the Vienna Convention. Failure to comply with these regulations can result in substantial fines, reaching several hundred euros.

According to the information obtained, in country X, there is still a requirement to place special

markings on the sides and rear of vehicles to indicate blind spots. This situation creates significant difficulties for entrepreneurs providing transport services, as there is no such obligation in Poland. As a result, Polish companies operating in country X are forced to specially adapt their vehicles, which involves additional costs and difficulties in conducting their business.



PRACTICING A PROFESSION/ RECOGNITION OF QUALIFICATIONS

Extension of the Professional Card (Black Book 2, point 13)

A Polish mountain guide received the European Professional Card (EPC) in country X for a period of 18 months, but was denied its extension due to differences in qualifications and the requirement to reapply and undergo an examination. Country X argued that the previous qualification check was not conducted in accordance with Directive 2005/36/EC. Such a refusal violates the principles of mutual recognition of professional qualifications and the freedom of establishment in the European Union. The European Commission referred the case to the Court of Justice of the European Union (CJEU), highlighting the need for harmonization of mountain guide qualifications at the EU level.

Member states may conduct a preliminary check of professional qualifications in accordance with Article 7(4) of Directive 2005/36/EC if justified by an overriding public interest. In the case of country X, this requirement was duly notified, but the candidate was not offered the opportunity to take an aptitude test before the automatic approval of the EPC, which constituted a breach of procedure.

The assessment of qualifications should be individualised and take into account the candidate's professional experience. The candidate has the option to reapply for the EPC, and the Member State should not require documents again that are already in the system and remain valid. Issues related to the difficulties in obtaining the EPC by Polish mountain guides in country X remain current, and in recent months, SOLVIT PL has received four more reports. Country X has not changed its approach and continues to apply the same procedures.

Problems with the insurance coverage (Black Book 2, point 11)

The issue was related to an almost sixfold increase in the amount of mandatory liability insurance for ski instructors, which was implemented in the mountainous provinces of country

X. This resulted in the practical impossibility for Polish instructors to purchase such insurance from both foreign and Polish insurance companies. The changes introduced in the insurance regulations of country X are not discriminatory in nature, but they are inconsistent with certain provisions of the Services Directive (2006/123/EC).

Ultimately, the problem was resolved, but not through changes in the regulations of country X – an organization representing Polish ski instructors signed an agreement with a Polish company that offered an appropriate level of insurance. The amount of mandatory insurance in country X (minimum 6 million euros) remains unchanged.

FINANCE/BANKING/ TENDER PROCEDURES

Part I – Previous Submissions

Inability to participate in public procurement procedures (Black Book 2, point 15)

A Polish entrepreneur encountered difficulties while submitting a bid via the tender platform for public procurement. Due to starting the upload of documents to the electronic system too late, he was unable to access technical support, which prevented him from signing the application with his electronic signature. Additionally, the issue related to the inability to file a court complaint due to formal reasons, stemming from the lack of space for the Polish tax identification number in the form, remains unresolved.

Although Directive 2014/24/EU requires that tools used for electronic communication be accessible and interoperable, the Polish contractor was unable to submit a bid despite using a qualified electronic signature. The platform operator indicated that the reason for not accepting the bid was the late uploading of documentation, and the institution conducting the tender noted that the documents could have been submitted without an electronic signature. However, the entrepreneur no longer had the opportunity to contact technical support before the bid submission deadline.

Additionally, the entrepreneur could not file a complaint in the local court because the electronic form required information about the equivalent of a tax identification number in the given country, and Poland was not listed among

the available options. As a result, the entrepreneur was deprived of the opportunity to appeal the tender conditions, which he considers discriminatory. At a later stage, the technical issues in that country were resolved, but the deadline was not reinstated for the entrepreneur affected by them.

Securing amounts for future tax (Black Book 1, point 3)

The case concerned the so-called withholding tax existing in country X, which involves the domestic client freezing a portion of the amounts due for completed work to secure potential unpaid taxes. The problem is the practice of national authorities and the long timelines for returning secured funds, which ultimately restrict the free provision of services.

To this day, the situation has not changed, and the problem remains current. The regulation requiring the client in country X to deduct 20% from each invoice issued by the entrepreneur posting an employee still applies. It is possible to apply for a refund of 'withholding tax,' but one should still expect a relatively long processing period for the application (it can be as long as 9–12 months).

Requirement to open bank accounts (Black Book 2, point 14)

Polish entrepreneurs reported a lack of contracts from contractors in country X due to the requirement to open a special account ('account Y'), from which funds can only be used to pay taxes. Opening such an account requires an agreement between the entrepreneur, the bank, and the tax and customs administration, and banks are reluctant to open accounts for foreign companies, which effectively prevents access to the market. Entrepreneurs indicate that this barrier still exists, and the planned legal changes will introduce further difficulties, such as the requirement to establish a bank guarantee of 100,000 euros, which will particularly affect micro and small businesses, preventing them from competing.

Moreover, entrepreneurs believe that the minimum wage law is discriminatory. Local companies can deduct in-kind benefits up to 25% of the net minimum wage, whereas foreign entities do not have this option. The internet is full of information about the requirements for 'account Y' and guides on how to open it, which shows that practice has developed a way to overcome these barriers. Nevertheless, they remain a significant obstacle for companies from outside country X wanting to operate in the single market.

Part II – New Submissions

Problems with opening bank accounts

In another country, there is also a problem with opening bank accounts for foreign entrepreneurs. Despite the government's declarations to attract investments, banks do not facilitate the process of opening accounts. Entrepreneurs, including small and medium-sized enterprises as well as large corporations, encounter numerous difficulties.

Refusals to open accounts are usually unjustified and communicated informally, with reasons including insufficient capital, an unconvincing business plan, and suspicions related to money laundering regulations. Clients try to provide letters of recommendation, but they are not always sufficient. Only some banks with branches in both countries engage in internal discussions, which prolongs the account opening process.

Entrepreneurs are advised by consulting firms or their lawyers to set up 'temporary accounts,' which allow for capital deposits and company registration. Nevertheless, this does not solve the issue with the operational account, which is crucial for starting business activities. These obstacles pose a significant barrier for foreign investors who do not understand the impediments to the free flow of capital in country X.

As a result of several Member States, including Poland, reporting the issue with opening accounts, SMET has recently undertaken its analysis. Currently, the project focuses on verifying whether consumers and businesses can open accounts with basic financial transaction functionalities in other European Union countries.

CERTIFICATION/ EXTRA PRODUCT REQUIREMENTS

Additional certification requirements (Black Book 1, point 8) and rules on construction product (Black Book 2, point 17)

The first issue concerned the situation where insurance companies in country X require construction products to have national certifications. In such cases, the CE mark is insufficient.

The second issue concerned the regulations of country X (at that time notified under the technical notification procedure), establishing extensive additional national requirements for harmonised construction products.

Entrepreneurs operating in the construction industry, who reported the mentioned barriers, indicate that the issues from several years ago have not disappeared. Moreover, they are deepening and new ones are emerging, along with new national requirements.

For example, in some EU countries, requirements are set at levels even twice as high as the European standard indicates, which lacks technical justification (e.g., tear strength for insulating material). Additionally, some countries also impose requirements for characteristics that lack justification, such as compressive strength, even though this particular material is not subjected to compression at all.

Polish entrepreneurs also report that distributors operating in a given country X, following the national rules applied in that market, will not offer an investor a product that does not have the parameters specified by the architect in the project, which makes it difficult for Polish manufacturers to sell their products. Although product certification carried out by the national (government) institute is voluntary, this system is deeply ingrained in the mentality and culture of country X – there is a belief that without a national certificate, a product is neither good nor safe. Discussions were held regarding the manufacturer purchasing additional insurance for the goods in Poland or from another international insurance company to ensure warranty liability, but distributors were unwilling to attempt to persuade investors to use products without a national certificate.

Meeting additional requirements and maintaining appropriate national approvals, certificates, audits, and tests involve additional, high costs. Entrepreneurs also question the rationale behind harmonization, as they point out that often the issuance of national documents (at least in some cases) requires having European documents based on harmonised standards, which results in double the costs, testing, and time. Questions also arise about the impact of such additional requirements on the environment – during (national) testing, the product is destroyed, and a lot of resources are consumed (up to 500 kg). Such tests seem pointless, especially if the manufacturer does not change anything in their product, and the only reason for conducting them is the additional testing required by national regulations.

Reports drawn up by business associations[14] confirm these issues.

The European Commission, recognising the

14 For example: Obstacles in the Single Market. Compendium, ERT or Renewing the dynamic of European integration: Single Market Stories by Business Leaders, ERT. Reports available on the ERT website https://ert.eu/single-market/

issues hindering the functioning of the single market for construction products, presented a proposal of a new regulation laying down harmonised conditions for the marketing of construction products (the so-called CPR regulation) at the beginning of 2022[15].

Certification of compliance with national standard (Black Book 2, point 16).

In country X, there is a certification standard for companies regarding compliance with tax regulations and employment conditions, stemming from collective labour agreements. The documentation of these procedures is available only in the local language. Entrepreneurs reported issues related to obtaining this certificate, overseen by the national foundation responsible for certifying companies in the temporary employment sector. Although the certificate is not mandatory, it is a common market requirement, practically essential for conducting business in the temporary employment market in country X and accessing this market.

Since 1 July 2023, the foundation, as the certifying body, introduced an additional requirement for certified companies to ensure that employees with an A1 certificate maintain ties with a foreign employer, and the verification of these certificates has become part of the certification process. However, the foundation is not the appropriate labour inspection authority, which raises doubts about the validity and compliance with EU regulations. The foundation's inspections may pose a barrier to the freedom to provide services, especially when there is no justification for refusing to delegate an employee with an A1 certificate.

According to information available online, the certificate is still practically essential for accessing this market for companies employing migrant workers in country X. Additionally, there are reports of plans to introduce a ban on providing services without local certification, which may pose another restriction for foreign companies.

Different national regulations (Black Book 1, point 13)

In several countries, national regulations have been introduced regarding formaldehyde emissions from wood-based materials/furniture, which define permissible concentration limits and various other requirements for these emissions in different ways (including specific labelling). While such actions by Member States are not, in principle, contrary to EU law, it must be acknowledged that they may cause issues in trading such products within the internal market.

On 14 July 2023, the European Commission adopted Regulation 2023/1464 amending Annex XVII to Regulation No 1907/2006 of the European Parliament and of the Council as regards formaldehyde and formaldehyde releasers. Based on this regulation, after 6 August 2026, products cannot be placed on the market if, under the test conditions specified in Appendix 14, the concentration of formaldehyde released from these products exceeds 0.062 mg/m3 for furniture and wood-based products. The provisions of Regulation 2023/1464 do not, however, address the potential for Member States to set lower values for this substance. At the same time, in at least one country, regulations in force since 2020 – which at that time posed a barrier – include the limits specified in Regulation 2023/1464.

15 Regulation 2024/3110 was published on December 18, 2024 https://eur-lex.europa.eu/eli/reg/2024/3110/oj/eng

It can therefore be stated that as a result of the introduction of EU-level regulations concerning formaldehyde emissions from wood-based materials/furniture after 6 August 2026 the issue will cease to exist.

Rules on product labelling (Black Book 2, point 18)

Many Member States have introduced or plan to introduce national requirements for product labelling indicating sorting rules (how to collect, reuse, or recycle packaging for disposal). Different requirements in individual Member States may pose an obstacle to the free movement of goods in the EU market due to significant logistical and financial burdens for manufacturers (different labelling for products sent to country X and different for those sent to country Y, etc.).

This is a problem often pointed out by businesses conducting cross-border activities.[16]

Some national labelling regulations have been challenged by the European Commission as part of a formal proceeding and have also been of interest to the European Parliament. At the end of 2022, the European Commission presented a proposal for a new regulation on packaging and packaging waste (known as PPWR)[17], which also included provisions on packaging labelling (including those related to deposit and return systems). Unfortunately, the draft did not completely harmonise these issues, which will certainly result in barriers for cross-border businesses remaining. The PPWR is expected to be adopted soon and published in the Official Journal of the European Union.

Increase of the share of domestic food (Black Book 2, point 19)

In 2021, country X implemented legislative changes that introduced the concept of 'dual quality food.' For a product to be considered of 'dual (inferior) quality,' it must have a substantially different composition, or properties compared to products sold in other countries. As part of these changes, country X adopted regulations that allow contracting entities in the public procurement process to prioritise domestic food.

The 2022 amendment strengthened the regulations, allowing contracting entities to require local or regional food from short supply chains, products compliant with Regulation (EU) No 1151/2012, or organic food. The criteria for labelling products with the logo of food originating from country X were also tightened, requiring, for example, that meat comes from animals born, raised, and slaughtered within its territory. These regulations may discriminate against foreign producers, including Polish ones, and violate the principles of free movement of goods under Articles 34–36 TFEU, creating unequal competition conditions in the market.

Country X argued that these regulations were intended to protect consumer interests, so their nature had to be proportional and could not lead to discrimination or constitute a hidden restriction on trade.

Ultimately, country X abandoned the introduction of regulations on mandatory domestic food sales limits in supermarkets following the intervention of the European Commission. The European Commission assessed these regulations as contrary to the principles of the EU single market, emphasising that they could infringe on the freedom of movement of goods and entrepreneurship. The planned regulations, which aimed to gradually increase the share of domestic products in sales, could have negatively impacted Polish exporters. As a result, thanks to the intervention of the EC, the legislature of country X abandoned the implementation of these changes. The effectiveness of the European Commission's response highlights the importance of its role in protecting the principles of the single market, which is why it is essential for the European Commission to react in similar situations, as this is when its actions yield quick results.

16 See also, for example, the reports available on the ERT website https://ert.eu/single-market/

17 https://eur-lex.europa.eu/legal-content/EN/TXT/?amp%3Bamp%3Bqid=1722605115472&uri=CELEX%3A52022PC0677

CONCLUSION

The current moment in which the European Union finds itself seems to be pivotal. The international situation compels us, Europeans, to deeply reflect on the future of our community, including its economy. This is confirmed by recent comprehensive reports by E. Letta and M. Draghi, whose conclusions clearly indicate the need for ambitious actions to strengthen the prosperity, competitiveness, and security of the EU on the global stage. The publication of important reports for the EU coincides with the beginning of the new term of the European Commission, creating an excellent opportunity for a reset and thus a chance to implement new initiatives.

The state of integration of the single market in terms of its fundamental freedoms cannot currently be considered satisfactory. The summary of the previously described issues shows that only 6 out of 25 matters identified in previous editions of the Black Book have been resolved, which constitutes just over 20% of all problems, while new barriers, often of a similar nature, continue to be identified in various Member States.

The result of the above analysis is therefore not optimistic. Most of the problems previously reported to us persist, leading either to increased costs of cross-border operations or even to entrepreneurs abandoning them altogether. Cross-border service provision, particularly the posting of workers, remains the most burdened by barriers. The barriers still have a complex nature, many of which stem from administrative practices and disproportionate actions in areas left to the discretion of national administrations. Therefore, combating them is difficult, even more so than it would be in the case of national regulations that are directly incompatible with EU law.

Referring to the barriers in the posting of workers, it is impossible not to mention in conclusion the harm caused to this activity – permitted and largely carried out by honest entrepreneurs – by the occasional negative and biased publications in some Member States. Such publications usually sensationalise exceptional and most extreme cases of legal violations, without relying on reliable data. They easily make their way into the press and media, causing significant harm, for example, by discouraging local contractors from cooperating with companies from other Member States or providing grounds for increased and already frequent and burdensome inspections of foreign companies posting workers.

The Black Books 1 and 2 also consider the effects of the COVID-19 pandemic, which imposed additional restrictions on certain sectors, including temporary protective measures in response to the health and economic crisis. An example includes restrictions imposed on drivers from other Member States and measures protecting domestic sectors such as agriculture. Although most of these restrictions have already been lifted, their adoption indicates protectionist tendencies that, according to many experts, may return in the future. The European Union responded to this situation by adopting the IMERA regulation (*Internal Market Emergency and Resilience Act*), which should be applied uniformly across the Community, and the European Commission should be prepared to use it decisively in crisis situations to ensure the smooth functioning of the single market.

The current situation certainly requires rethinking the ways of implementing regulations and improving existing mechanisms, taking into account the situation of businesses operating cross-border while ensuring adequate protection for workers. The appointment of a commissioner with clearly defined responsibilities in this area gives hope that the Commission will attach great importance to these issues. An important element is also the new single market strategy, which is to be published no later than June 2025. We expect that the issue of market barriers and a concrete action plan for their removal, particularly those concerning the freedom to provide services, will occupy an important place in it.

However, the problems described above show how much responsibility rests with the Member States, whose decisions often determine how EU law is applied. This is a principle stemming from the structure of the Union, and therefore the weight of this responsibility must be felt by the states. We should pay particular attention to the effective implementation of existing instruments, without creating new ones. Tools such as SOLVIT and SMET can be effective platforms for reporting problems and seeking solutions more efficiently. They can also serve as a significant forum for dialogue between countries.

It is also extremely important that the infringe-

ment procedure – an effective tool at the disposal of the European Commission – be consistently utilised, and that the Commission's actions in this area be more transparent. This will ensure not only equal treatment of all Member States violating EU regulations but also demonstrate why and how efficiently the Commission responds to irregularities.

We therefore hope that the beginning of the new term of the European Commission and the Polish presidency of the Council of the European Union will serve as an impetus to strengthen actions and renew discussions on the full realization in practice of the single market principles, which still hold great untapped potential. The key is our commitment and activity – at every level.

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